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CITATIONS

405-184—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13–20) is reported at 427 F. 2d 312. The Board's decision and direction of election in the representation proceeding (App. C, *infra*, pp. 34–40) are reported at 167 NLRB 691. Its decision and order in the ensuing unfair labor practice case (App. C, *infra*, pp. 23–24) are reported at 170 NLRB No. 156.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1970, and the Board's timely petition

for rehearing en banc was denied on June 5, 1970 (App. B, *infra*, pp. 21–22). On August 29, 1970, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to October 1, 1970.

QUESTIONS PRESENTED

1. Whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created by a state is a "political subdivision" thereof and therefore not an "employer" subject to the Act.

2. Whether the Board properly concluded that the respondent public utility district is not a political subdivision of the State of Tennessee, and whether, under the correct standard of judicial review, the court of appeals should have upheld that determination.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 2. When used in this Act—
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any State or political subdivision thereof * * *.
>
> * * * * *
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On April 24, 1967, the Union[1] filed a petition with the Board, pursuant to Section 9(c) of the National Labor Relations Act, seeking to represent the pipefitters employed by the Natural Gas Utility District of Hawkins County, Tennessee (App. C, *infra*, pp. 25, 27–28). The District moved to dismiss the petition on the ground that it was a political subdivision of the State of Tennessee and thus not an employer within the meaning of Section 2(2) of the Act (R. 89–90).[2] The Board rejected this contention and directed that an election be held (App. C, *infra*, pp. 38–40). The Union won the election and was certified as the employees' representative (R. 21, 27). Upon the District's subsequent refusal to recognize and bargain with the Union on the ground that it was not an employer under the Act, the Union filed an unfair labor practice charge which initiated the present case (App. C, *infra*, p. 23). The undisputed facts with respect to the District's status as an employer under the Act are as follows:

The District, which is engaged in the sale and distribution of natural gas, without profit, to residential homes, commercial businesses, and industrial firms in Hawkins County, Tennessee, (App. C, *infra*, p. 35;

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[1] United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102.

[2] "R." refers to the joint appendix before the court of appeals, a copy of which has been filed with the petition.

R. 91), was incorporated in December 1957, under the Tennessee Utility District Law of 1937 (R. 98–130).[2] Pursuant to that law, a group of local real property holders in Hawkins County filed a petition with the County Court setting forth a statement of the need for the service to be supplied, an estimate of the cost, and the names of three local residents proposed as commissioners of the District (R. 60–63). Following a hearing, the Chairman of the County Court of Hawkins County approved creation of the District and granted the petition. (App. C, *infra,* p. 37, n. 7; R. 60–64, 95.) As required by the state statute (R. 101), the County Judge appointed as commissioners of the newly created District the three people nominated in the petition (App. C, *infra,* p. 37, n. 8; R. 95–96).

The powers of the District are vested in and exercised by a three-member board of commissioners, who are not subject to state or county regulation (App. C, *infra,* pp. 37–38, R. 93, 95; 117, 106). The commissioners adopt necessary rules or regulations, and set the fees charged for the District's services (R. 93). They also control the labor relations policy of the District. The manager of the District, who is under the supervision of the board of commissioners, hires and fires its employees and sets their wages. (R. 93–94.) Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees (App. C, *infra,* p. 38; R. 94).

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[2] There are about 270 similar utility districts in the state (R. 29, 50).

No public money was utilized in organizing the District; it was financed through the private sale of bonds (R. 97, 65–76). Principal and interest on the bonds are payable solely from the revenues of the District (R. 112). Rates charged by the District must be sufficient to pay its expenses, plus the bond debt as it comes due (R. 113).

The statute under which the District was organized states that a utility district is a "'municipality' or public corporation," and specifically exempts it from "state, county and municipal taxation" (R. 101, 113). The Supreme Court of Tennessee has upheld this tax exemption on the ground that utility districts are "arms or instrumentalities" of the state (App. C, *infra,* pp. 35–36).[4] The statute further gives the District the power of eminent domain (R. 104–105), and empowers the board of commissioners to inquire into any matter relating to the affairs of the District and to issue subpoenas and administer oaths for this purpose (App. C, *infra,* p. 38; R. 107). The District, however, has no power to levy or collect taxes and its charges for services are not construed to be taxes (App. C, *infra,* pp. 35–36, n. 2; R. 117).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

In its initial decision in the representation proceeding (App. C, *infra,* pp. 34–35, 38), the Board rejected the District's contention that it was a political

[4] *First Suburban Water Utility District* v. *McCanless,* 177 Tenn. 128, 146 S. W. 2d 948, 950.

subdivision of the State of Tennessee within the meaning of Section 2(2) of the National Labor Relations Act and thus not subject to the Act. The Board noted that the Tennessee statute specifically states that a utility district is a "municipality" or "public corporation" and that the Supreme Court of Tennessee had concluded that such districts are "arms or instrumentalities" of the state, but held that such characterizations are not necessarily controlling in interpreting the National Labor Relations Act. Relying on *National Labor Relations Board* v. *Randolph Electric Membership Corp.*, 343 F. 2d 60 (C.A. 4), and *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, for the proposition that the scope of the National Labor Relations Act is to be determined by federal standards and not by the varying declarations and classifications of state law (App. C, *infra*, p. 36, n. 4), the Board examined all the relevant factors and concluded that the District was "an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act" (App. C, *infra*, p. 37).

In its subsequent decision finding that the District had committed unfair labor practices by refusing to bargain with the Union, the Board relied on its earlier determination that the District was an "employer" covered by the Act (App. C, *infra*, p. 26). Accordingly, the Board held that the District's refusal to bargain with the Union selected by its employees violated Section 8(a) (5) and (1) of the Act (App.

C, *infra,* p. 30). The Board ordered the District to cease and desist from the unfair labor practices found, to bargain with the Union upon request and to post appropriate notices (App. C, *infra,* pp. 31–34).

A divided court of appeals declined to enforce the Board's order (App. A., *infra,* pp. 13–20), ruling that state law is controlling on the issue whether the District is a "political subdivision" within the meaning of Section 2(2) of the Act. Referring to state pronouncements on the issue and the Fourth Circuit's opinion in *Randolph, supra,* the court stated (App. A, *infra,* pp. 18–19):

> In our opinion, the state has a right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute political subdivisions that ought to be binding on federal administrative agencies.
>
> * * * * *
>
> The Court in *Randolph* gave great weight to the decision of the Board in that case because of the Board's "familiarity with labor problems and its experience in the administration of the Act." [343 F. 2d at 62]. In our judgment, the present case involves more of a question of *municipal law* than a *labor problem,* and the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board. [Emphasis in the original.]

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REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals below that state rather than federal law governs the determination whether a particular entity is a political subdivision of a state for purposes of the National Labor Relations Act conflicts with the decision of the Fourth Circuit in *National Labor Relations Board* v. *Randolph Electric Membership Corporation*, 343 F. 2d 60. *Randolph Electric* involved the status under the Act of non-profit public utility membership corporations created pursuant to a similar state (North Carolina) statute. In upholding the Board's determination that the corporations were not state political subdivisions (and hence were employers under the Labor Act), the court rejected the contention that "state law declarations and interpretations should control in determining whether an organization is a 'political subdivision'" (343 F. 2d at 62). The court noted that, although there are instances in which application of particular federal statutes may depend on state law, whether state law applies depends in each case upon the intent of Congress; and it concluded that, with respect to the National Labor Relations Act

> * * * it is clear that state law is not controlling and that it is to the actual operations and characteristics of [the utility corporations] that we must look in deciding whether there is sufficient support for the Board's conclusion that they are not "political subdivisions" within the meaning of the National Labor Relations Act. [*Id.* at 63.]

In the present case, on the other hand, the Sixth Circuit stated that this case "involves more a question of *municipal law* than a *labor problem*", and held that the decision "of the Supreme Court of Tennessee" * * * [that] the District was a political subdivision of the state * * * was binding on the Board" (App. A, *infra*, p. 19).[5]

In thus giving the state law determination controlling weight in applying the federal statute, the court below departed from settled principles governing the interpretation of the National Labor Relations Act. Although Congress in Section 2(2) of the National Labor Relations Act has exempted political subdivisions of a state from the coverage of the Act, it has, as with other coverage questions, left it to the Board to formulate the criteria for determining when an entity shall be deemed to be a state instrumentality for purposes of the Act. A state's own characterization of an entity is not decisive for purposes of the Act. For the National Labor Relations Act

> is federal legislation, administered by a national agency, intended to solve a national prob-

[5] The Sixth Circuit sought to distinguish *Randolph* on the ground that, "unlike our case, there was no holding by the state's highest court that the private utilities were subdivisions of the state" (App. A, *infra*, p. 15). But in *Randolph*, there was a specific statutory declaration to that effect by the North Carolina legislature, and several successive State Attorneys General had so held. 343 F. 2d at 62. In addition, the Sixth Circuit relied on the fact that in *Randolph* the corporations lacked any power of eminent domain (App. A, *infra*, p. 15). However, this is not particularly relevant; legislatures "have frequently delegated such power to nonexempt privately-owned and operated public service corporations" (App. C, *infra*, p. 38, and authorities there cited).

> lem on a national scale. * * * Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by * * * varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different state standard the respective states may see fit to adopt for the disposition of unrelated, local problems. * * * [*National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 123.]

The conflict is one that this Court should resolve. The Court in other contexts frequently has reviewed the question whether federal or state law controls the interpretation and administration of federal statutes and activities. See, *e.g.*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Standard Oil Co.*, 332 U.S. 301; *United States* v. *Shimer*, 367 U.S. 374; *Free* v. *Bland*, 369 U.S. 663. Moreover, this particular decision, if allowed to stand, would have an important and adverse impact upon the administration of the National Labor Relations Act.

In addition to the nearly 270 utility districts in Tennessee to which the decision below directly applies, there are a large number of similar entities elsewhere in the country. Since the states tend to characterize those entities as political subdivisions,[6] the de-

[6] See, *e.g.*, N.C. Gen. Stat., Sec. 117-19; Ariz. Const., Art. 13, Sec. 7. See also McQuillin, *Municipal Corporations*, Sections 2.26, 2.27, and 2.29, at pp. 477-487 (3d ed.).

In urging that federal rather than state law determines whether such districts are political subdivisions of a State under the Labor Act, we of course raise no question as to the propriety of such characterization for state law purposes. Nor do we here take any position on whether these districts are or are not political subdivisions under other federal legislation.

cision below, by treating such state characterization as controlling under the Labor Act, is likely to deny the benefits of the Act to a large but indeterminate number of employees of utility districts throughout the country. At the very least, the decision is almost certain to cause substantial litigation.

2. The Board properly concluded that, as a matter of federal law, the District is not a political subdivision of the State of Tennessee. Under the limited scope of judicial review of such agency determinations, the court of appeals should have upheld the ruling. Cf. *Randolph Electric, supra.*

The Board carefully analyzed the legal structure of the District and placed special emphasis on the fact that private individuals, rather than state or county officials, made up the board of commissioners which controlled the operations of the District and were ultimately responsible for the terms and conditions of employment of the District's employees. Weighing these factors in the context of all the other relevant considerations, the Board justifiably concluded that the District was not a "political subdivision." Cf. *Division 1287, Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees* v. *Missouri,* 374 U.S. 74, 81. Whether or not the court below would have reached the same conclusion on its own *de novo* evaluation of the facts, it should have accepted the considered and specialized judgment of the Board on a matter largely within the agency's discretion. See *National Labor Relations Board* v. *United Insurance Co.,* 390 U.S. 254, 260; *National Labor Relations Board* v.

Hearst Publications, 322 U.S. 111, 130–131; *National Labor Relations Board* v. *Atkins & Co.*, 331 U.S. 398, 403–404, 412–415.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SAMUEL HUNTINGTON,
Assistant to the Solicitor General.
ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION GRIFFIN,
Attorney,
National Labor Relations Board.

OCTOBER 1970.

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE, RESPONDENT

Decided March 17, 1970

On Application For Enforcement of an Order of The National Labor Relations Board

Before WEICK, COMBS and BROOKS,* Circuit Judges

WEICK, Circuit Judge. This case is before us on the application of National Labor Relations Board for enforcement of its order issued against The Natural Gas Utility District of Hawkins County, Tennessee [the District], which order found that the District violated Section 8(a) (5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. § 151, et seq.), by refusing to bargain with the union certified by the Board as the representative of a unit of the District's pipe fitters. 167 NLRB No. 100 and 170 NLRB No. 156.

The District had refused to bargain with the union on the ground that it (the District) was a political

*The Honorable Henry L. Brooks, then Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation. Judge Brooks has since become a member of this Court.

subdivision of the state of Tennessee, therefore it was exempt from the operation of the Act and the Board had no jurisdiction over it.[1]

Section 6–2607 of the Tennessee Code, under which the Utility District was organized, provided that a District is a "*municipality* or *public corporation* in perpetuity under its corporate name and the same shall be in that name a *body politic and corporate with power of perpetual succession,* but without any power to levy or collect taxes." [Italics added.]

The Supreme Court of Tennessee construed this statute in *First Suburban Water Util. Dist.* v. *McCanless,* 177 Tenn. 128, 146 S.W.2d 948 (1941), and held that a District organized under it was a municipal corporation and as such was an arm or instrumentality of the state.

The Board declined to follow the decision of Tennessee's highest court, relying instead on *NLRB* v. *Randolph Elec. Membership Corp.,* 343 F.2d 60 (4th Cir. 1965), which case involved private non-profit utility corporations organized under the laws of North Carolina, which were formed for the exclusive benefit of their own members, did not have the power of eminent domain, were not subject to substantial control

[1] Section 2(2) of the Act provides:

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (29 U.S.C. § 152(2))

or supervision, and did not exercise any portion of the sovereign power of the state. The Board reasoned:

> "The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity." (App., p. 15 n. 7)

This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certificates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission, and was exempt from all state taxes.

Reliance by the Board on *Randolph* is misplaced. In *Randolph,* unlike our case, there was no holding by the state's highest court that the private utilities were political subdivisions of the state.

In *Randolph* the private utilities were "formed for the exclusive benefit of its own members." Here, the District was formed for the benefit of the inhabitants of the community.

In *Randolph,* the utilities involved did not have the power of eminent domain. Here, the District not only has the power of eminent domain but also can exercise it over other governmental entities.

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The Commissioners of the District further have the power to subpoena witnesses and to administer oaths. The District's records are "public records". The District is required to publish its annual statement in a newspaper of general circulation. Income from its bonds is claimed to be exempt from federal income taxes. Social Security benefits for its employees are voluntary instead of mandatory as the District is considered "a political subdivision" under 42 U.S.C. § 418(5).

In our opinion, it was not necessary that the District be created directly by the state in order to constitute a political subdivision. It is sufficient if the District be created in conformity with state law.

It should be noted that the Act does not require agencies of either federal or state governments to be created directly. As a matter of fact, wholly owned government corporations, including the Federal Reserve Bank and even non-profit hospitals, are specifically exempt.[2]

Under Tennessee law the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity therefor. The county judge appoints the first three commissioners nominated in the petition seeking formation of the District, and fills vacancies in the event the commissioners cannot agree among themselves. In counties having a population of 482,000 or more the commissioners of the Districts are elected at regular general elections. Although the District involved in the present case did not have the requisite number of resi-

[2] We disagree with the Board's ruling that because the State does not supervise the District or remove or discipline its commissioners or subordinates, therefore the District is not a political subdivision. We would think that the independence of the District strengthens rather than weakens the proposition that it is a political subdivision.

dents to necessitate the election of its commissioners, this factor indicates that Tennessee considers the functions of a District to be that of a "political subdivision" requiring election of commissioners by the electors when the District encompasses a specified population.

Prior decisions of the Board do not support its holding here. In *Mobile S. S. Ass'n,* 8 NLRB 1297 (1938), the Board held that the State Docks Commission was an exempt political subdivision of the state of Alabama, without discussion of its particular functions or the legal criteria to be applied. In *Oxnard Harbor Dist.,* 34 NLRB 1285 (1941), the Board reviewed extensively the functions of the District and held it was a political subdivision. There was no indication that any particular characteristic was determinative.

In *New Jersey Turnpike Authority,* 2–RC–2245, April 16, 1954, reported unofficially at 33 L.R.R.M. 1528, the Board held that the Turnpike Authority was a political subdivision in view of its powers, duties, and obligations given to it by the state. Three factors were indicated as determinative of the issue, *i.e.,* the administrators were appointed by the Governor; it had the power of eminent domain; and its bonds were tax exempt.

In *New Bedford, Wood's Hole, Martha's Vineyard, etc. S.S. Authority,* 127 NLRB 1322 (1960), the Authority was established to own and operate a steamship line. The Board was of the opinion that state law, *i.e.,* a determination by the highest court in the state, was controlling on what constitutes a political subdivision. In that case the Board cited *West* v. *American Tel. & Tel. Co.,* 311 U.S. 223, 236 (1940), which held:

> True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final

> arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law * * *

The Court in *Randolph* was of the view that this opinion of the Board in *New Bedford* was based on a misconception of the holding of the Supreme Court in *R.F.C.* v. *Beaver County,* 328 U.S. 204 (1946), on which the Board relied. *NLRB* v. *Randolph Elec. Membership Corp., supra,* at 63 n. 6. In our opinion, the Board in *New Bedford* did not err in applying the holdings in *West* and *Beaver County.* There was no conflict with national policy. The Board noted, however, in *New Bedford* that there had been no determination in the state courts as to whether the companies were political subdivisions. The Board then proceeded to review certain specific characteristics of the entities before deciding that they were exempt "political subdivisions."

The Board in *New Bedford* indicated that the following factors were important: 1—The members of the Authority were appointed and removed by the Governor with the consent of the executive council; 2—The Authority's bonds were classified as those of the state; 3—The Authority was performing essential governmental functions; 4—The Authority enjoyed tax exempt status; and 5—The bonds were exempt from taxation.

In our opinion, the state has a right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute political subdivisions, that ought to be binding on federal administrative agencies.

It was the clear intention of Congress not to make amenable to the National Labor Relations Act employees of either federal or state governments. The effect of the order of the Board in the present case

may be to extend its jurisdiction over public employees in nearly 270 Utility Districts in Tennessee, which Districts perform a wide variety of public functions.

The Court in *Randolph* gave great weight to the decision of the Board in that case because of the Board's "familiarity with labor problems and its experience in the administration of the Act." *Id.* at 62. In our judgment, the present case involves more of a question of *municipal law* than a *labor problem*, and the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board.

Enforcement is denied.

COMBS, Circuit Judge, dissenting. I would grant enforcement on authority of *N.L.R.B* v. *Randolph Electric Membership Corporation,* 343 F. 2d 60 (4th Cir. 1965). In that case the court upheld the Board's finding that a non-profit corporation organized under the North Carolina Electric Membership Corporation Act was an "employer" within the meaning of 29 U.S.C. § 152(2). In discussing the scope of review of the Board's determination, the court observed at page 62:

> "To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect. [Citing case.] Our function as a reviewing court is limited to determining whether the Board's conclusion has 'warrant in the record' and a 'reasonable basis in law.' "

I think this is the proper standard. Cf. *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968).

Federal law, rather than state legislative or judicial pronouncements, is controlling. *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111 (1944); *N.L.R.B.* v. *Ran-*

dolph Electric Membership Corporation, supra. In *Randolph,* at page 64, the court said:

> "The fact that North Carolina sees fit to characterize such corporations as 'political subdivisions' and to accord them certain benefits in respect to state taxation and otherwise * * * is not decisive * * * since their relation to the state and their actual methods of operation do not fit the label given them."

The Board concluded that the District here involved is not a "political subdivision" of the state because it was neither created directly by the state nor administered by state appointed or publicly elected officials. The Board noted that the District's operations and services do not differ significantly from those of private utilities whose employees are subject to the Act. The District is completely autonomous in the conduct of its daily affairs; the state exercises no supervision and reserves no power to remove or discipline those responsible for its operations.

Although incorporation of utility districts is authorized by an elaborate statutory scheme, respondent's actual creation resulted from the direct efforts of local residents desirous of obtaining the benefits of natural gas. The District's manager testified unequivocally that it is governed by the board of commissioners which adopts rules and regulations necessary to its operation; that the board sets all service rates; that the manager, and ultimately the board, hires and fires employees and determines wages; that neither the employees nor the District is controlled in any way by the county or state government.

It is noted that the furnishing of natural gas is the only service provided by this District and this is not necessarily a governmental function.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE, RESPONDENT

[Filed Mar. 17, 1970, Carl W. Reuss, clerk]

Order

Before: WEICK, COMBS and BROOKS, Circuit Judges

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that enforcement of the order of the National Labor Relations Board is denied.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

Issued as Mandate: June 23, 1970.
Costs: None.
A true copy.
Attest:

CARL W. REUSS,
Clerk.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE, RESPONDENT

[Filed June 5, 1970, Carl W. Reuss, clerk]

Order

Before: WEICK, COMBS and BROOKS, Circuit Judges.

This cause came on to be heard on the petition for rehearing en banc, and a majority of the Judges of the Court not having voted in favor of the request for rehearing en banc, the Court finds that said petition for rehearing is not well taken and should be denied. Judges Edwards and Combs voted in favor of rehearing en banc.

It is therefore ORDERED that the petition for rehearing be and it is hereby denied. Judge Combs dissents.

Entered by order of the Court.

CARL W. REUSS.
Clerk.

APPENDIX C

United States of America

Before the

National Labor Relations Board

Case No. 10–CA–7213

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AMERICAN FEDERATION OF LABOR, LOCAL NO. 102

DECISION AND ORDER

Upon a charge filed by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint dated February 1, 1968, against The Natural Gas Utility District of Hawkins County, Tennessee, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended.

Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

The complaint alleges, in substance, that on November 6, 1967, the Union was duly certified as the exclusive bargaining representative of the Respondent's employees in an appropriate unit, and that, on or about December 7, 1967, and thereafter, the Respondent refused to recognize or bargain with the Union as such exclusive bargaining representative, although the Union requested the Respondent to do so. On February 6, 1968, Respondent filed its answer to the complaint, in which it admitted in part and denied in part the allegations contained therein, and requested that the complaint be dismissed.

On February 16, 1968, the General Counsel filed with the Board a Motion for Summary Judgment, asserting that there were no issues of fact or law which had not already been litigated before and determined by the Board in a Decision and Direction of Election in a prior representation case,[1] and requesting an appropriate order remedying the violations as alleged in the complaint. Thereafter, on February 19, 1968, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why General Counsel's Motion for Summary Judgment should not be granted. Pursuant thereto, Respondent filed a Response to the Notice to Show Cause with a supporting Memorandum.

Upon the entire record in this case, the Board makes the following:

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[1] 167 NLRB No. 100.

RULING ON THE MOTION FOR SUMMARY JUDGMENT

The record establishes that pursuant to a petition filed by the Union on April 24, 1967, in the abovementioned representation case, a hearing was held before a Hearing Officer of the Board on June 19, 1967, at the close of which the proceeding was transferred to the Board. The Respondent denied that its operations were within the Board's statutory jurisdiction, contending that it was and is an exempt political subdivision of the State of Tennessee. On October 6, 1967, the Board issued its Decision and Direction of Election in which jurisdiction was asserted. On October 19, 1967, the Respondent filed with the Board a motion for further hearing on the jurisdictional issue. The Board, having duly considered the matter, denied the motion on October 24, 1967.

On October 27, 1967, an election was held, in which a majority of the valid ballots were cast for the Union. No objections having been filed, the Union was certified on November 6, 1967.

By letter dated December 4, 1967, the Union requested the Respondent to bargain collectively. Respondent, by letter dated December 7, 1967, refused to bargain collectively with the Union, and on January 10, 1968, the Union filed the charge upon which these proceedings are predicated.

In its Response to the Notice to Show Cause, Respondent predicates its refusal to bargain solely upon its denial of the Board's jurisdiction. Respondent alleges that it is not an "employer" as defined in Section 2(2) of the Act, but rather, a political subdivision of the State of Tennessee. Respondent accordingly contests the validity of the Board-conducted election and the Certification of Representative based thereon.

It is well settled that in the absence of newly discovered or previously unavailable evidence, a respondent in a section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been raised in the prior representation proceeding.[5] As all contentions now made were raised at the earlier hearing in the representation case,[6] and were considered and rejected by the Board, and as all factual allegations of the complaint are admitted by Respondent's answer to the complaint or stand admitted by the failure of Respondent to controvert the averments of the General Counsel's motion, there are no matters in issue requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted.

On the basis of the record before it, the Board makes the following:

[5] Pittsburgh Plate Glass Company v. N. L. R. B., 313 U.S. 146; N. L. R. B. v. Aerovox Corp., F. 2d (C.A. 4, January 29, 1968); The Sheffield Corporation, 163 NLRB No. 34; and Collins & Aikman Corp., 160 NLRB 1750.

[6] The Respondent's contention that the decision in The West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee, 26 RC 2972 (not published in NLRB volumes), is in conflict with and requires reversal of the Board's Decision and Direction of Election in the prior representation case is without merit. That case was decided on September 1, 1967, by the Regional Director for Region 26, who found that the employer therein was a political subdivision of the State of Tennessee and not an "employer" within the meaning of Section 2(2) of the Act. However, no Request for Review by the Board was filed by any party thereto. Accordingly, the Board had no occasion to affirm or reject that holding, and it is not controlling in the instant matter.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is incorporated under the provisions of the Tennessee Utility District Act and maintains its principal office and place of business at Rogersville, Tennessee, where it is engaged in the sale and distribution of natural gas to residential houses, commercial businesses, and industrial firms located in Hawkins County, Tennessee. During the course and conduct of its business operations for the preceding calender year, the Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Tennessee. During the same period of time, the Respondent received gross revenue valued in excess of $250,000. We find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The representation proceeding*

1. The unit

The following employees at the Respondent's Rogersville, Tennessee, operation constitute a unit ap-

propriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All pipe fitters, but excluding all other employees, office clerical employees, sales men, warehousemen, professional employees, guards and supervisors as defined in the Act.

2. The certification

On October 27, 1967, a majority of the employees of Respondent in said unit, in an election by secret ballot conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purpose of collective bargaining with Respondent, and on November 6, 1967, the Regional Director for Region 10 certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. The request to bargain and the Respondent's refusal

Commencing on or about December 4, 1967, and continuing to date, the Union has been requesting the Respondent to bargain collectively with it with respect to wages, hours, and working conditions of the employees in the appropriate unit. At all times since on or about December 7, 1967, Respondent admittedly has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Respondent has, since on or about December 7, 1967, refused to bargain collectively with the Union as the exclusive bargain-

ing representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The acts of the Respondent set forth in Section III, above, occuring in connection with its operations as described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

1. The Natural Gas Utility District of Hawkins County, Tennessee, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of

the United States and Canada, American Federation of Labor, Local No. 102, is a labor organization within the meaning of Section 2(5) of the Act.

3. All pipe fitters employed at the Respondent's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 6, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 7, 1967, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondent, The Natural Gas Utility District of Hawkins County, Tennessee, Rogersville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All pipe fitters employed at the Respondent's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understand-

ing is reached, embody such understanding in a signed agreement.

(b) Post at its Rogersville, Tennessee, place of business, copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 10, in writing within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C.

FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,
HOWARD JENKINS, JR.
Member,
National Labor Relations Board.

(Seal)

[1] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Order."

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not refuse to bargain collectively with United Association Of Journeymen And Apprentices Of The Plumbing And Pipe Fitting Industry Of The United States And Canada, American Federation of Labor, Local No. 102, as the exclusive representative of the employees in the bargaining unit described below.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We Will, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All pipe fitters employed at the Employer's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employ-

ees, guards, and supervisors as defined in the Act.

The Natural Gas Utility District of Hawkins County, Tennessee
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 730 Peachtree Street, N. E., Room 701, Atlanta, Georgia 30308, Telephone Number 526-5760, if they have any question concerning this notice or compliance with its provisions.

Decision and Direction of Election

(Case No. 10-RC-7070)

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before George L. Card, Jr., Hearing Officer. Thereafter, the Employer and the Petitioner filed briefs.

The National Labor Relations Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The Employer, also referred to as the District, moved to dismiss the petition on grounds that, as an exempt political subdivision of the State of Tennessee, the Board may not assert jurisdiction herein. In rejecting this contention, we find that the Employer

is not a political subdivision within the meaning of Section 2(2) the National Labor Relations Act, as amended.[1]

In this connection, the facts show that the Employer was incorporated in December 1957 under the provisions of the Tennessee Utility District Act and is engaged in the sale and distribution of natural gas to residential houses, commercial businesses, and industrial firms, all of which are located within Hawkins County, Tennessee.

The Respondent is organized to supply gas utility service without pecuniary profit. The Respondent conducts its business without supervision of the State or any political subdivision thereof. It hires its own employees, and sets their terms and conditions of employment. It also has the usual powers of a private corporation, e.g., it may sue and be sued, incur obligations, issue bonds, sell and encumber its property, and enter into contracts necessary or convenient to the exercise of the powers granted to it.

The Respondent contends, however, that it is not the customary public utility inasmuch as the Tennessee statute under which it is organized specifically declares that a utility district is a "municipality" or "public corporation,"[2] and the Supreme Court of

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[1] Section 2(2) reads in material part: "The term 'employer' * * * shall not include * * * any State or political subdivision thereof. * * * "

[2] Tennessee Code, title 6, ch. 26, sec. 7, District as municipality—Powers.

From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.

Tennessee has held that utility districts are "arms or instrumentalities" of the State of Tennessee.[3] However, while such state law declarations and interpretations are given careful consideration by the Board, they are not necessarily controlling.[4] Rather, the determination of whether a particular entity falls within the exemption for political subdivisions entails an assessment of all relevant factors. Upon examination of the instant record in the light of the "economic

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Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the Board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district unless and until it shall have been established that the public convenience and necessity requires other or additional services. [Acts 1937, ch. 248, sec. 3; C. Supp. 1950, sec. 3695.28.]

[3] First Suburban Water Utility Dist. v. McCanless, 177 Tenn. 128, 146 S. W. 2d 948 (1941).

[4] In N.L.R.B. v. Randolph Electric Membership Corporation and N.L.R.B. v. Tri-County Electric Membership Corporation, 343 F. 2d 60, 62 (C.A. 4), the Court, in sustaining the Board's finding that the companies were not "political subdivisions" despite the State legislature's declaration to the contrary and similar interpretations by State Attorney Generals, held:

"In the absence of a plain indication to the contrary, however, it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on State law."

In accord: N.L.R.B. v. Hearst Publications, 322 U. S. 111, 123 (1944), ". . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective States may see fit to adopt for the disposition of unrelated, local problems."

realities and statutory purposes,"[5] we are satisfied that the Employer exists as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act. Thus, unlike the usual situation where jurisdiction has been declined on political subdivision grounds,[6] the Employer in this case is neither created directly by the State,[7] nor administered by State-appointed or elected officials.[8] Furthermore, its operations and services do not differ significantly from those of enterprises in private industry including

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[5] See Randolph, supra, at p. 62.

[6] See, e.g., Mobile Steamship Association, et al., 8 NLRB 1297, where the State Docks Commission, one of the employers, was created by specific legislation of the State of Alabama; Oxnard Harbor District, 34 NLRB 1285, a harbor district organized by district residents under a general enabling act of California, but governed by a board of commissioners elected for a term of office by qualified voters of the district; New Jersey Turnpike Authority, 2-RC-2245, April 16, 1954, an authority specifically created by the Legislature and governed by members appointed by the Governor with advice and consent of the Senate; New Bedford, Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority, 127 NLRB 1322, a body corporate created by Massachusetts, consisting of members appointed and removed by the Governor with the advice and consent of the Executive Council.

[7] The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity.

[8] The County Judge exercises no independent discretion in naming the members of the Board of Commissioners. He must by statute appoint those persons nominated in the petition seeking formation of a district.

utilities whose employees are entitled to the benefits of the Act. The Employer is completely autonomous in the conduct of its day-to-day affairs, with the State exercising no supervisory role with respect thereto, or reserving any power to remove or otherwise discipline those responsible for the Employer's operations. In these circumstances, we are satisfied that the State pronouncements are not determinative of the public nature of the Employer's functions and activities. We are also not persuaded that mere possession of the power of eminent domain which, as here, has been conferred in aid of a venture which is essentially private in nature, requires us to find that the Employer constitutes a political subdivision under Section 2(2) of the Act. In this regard, we think it significant that legislatures have frequently delegated such power to non-exempt privately-owned and operated service corporations.[9] Indeed, the Tennessee Legislature itself has delegated such authority to private corporations.[10]

In these circumstances we find that the District is an Employer within the meaning of Section 2(2) of the National Labor Relations Act, as amended. Accordingly, and as the record shows and the parties agree that the Employer's operations satisfy the Board's commerce standards for public utilities, we

[9] N. C. Public Service Co. v. Southern Power Co., 282 F[ed.] . . . 837 (C.A. 4), writ of cert. denied, 263 U. S. 508; Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 175 S. E. 698; Berry v. Southern Pine Electric Power Assn., 222 Miss. 260, 76 So. 2d 212; Bookhart v. Central Electric Power Coop., 219 S. C. 414, 65 S. E. 2d 781, as explained in Black River Electric Coop. v. Public Service Commission, 238 S. C. 232, 120 S. E. 2d 6, 12; Hagans v. Excelsior Electric Membership Corp., 207 Ga. 53, 60 S. E. 2d 162; Alabama Power Co. v. Cullman County Electric Membership Corp., 234 Ala. 396, 174 So. 866.

[10] Tennessee Code, title 48, ch. 1, sec. 1, et seq.

find that the Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. In accordance with the parties' stipulation, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All pipe fitters employed at the Employer's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 10 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the

military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[11] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local Union No. 102.

Dated, Washington, D.C., Oct. 6, 1967.

FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,
HOWARD JENKINS, JR.,
Member,
(Seal) National Labor Relations Board.

[11] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 10 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. Excelsior Underwear Inc., 156 NLRB 1236.

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